IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 1632 of 2007

For Approval and Signature:
HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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NARCOTICS CONTROL BUREAU THRO'SANJAY PATEL - Applicant(s)
Versus
ANWARSHEIKH AMIRSHEIKH BAIG @ RAJU & 1 - Respondent(s)

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Appearance :
MR PR ABICHANDANI for Applicant(s) : 1,
UNSERVED-REFUSED (R) for Respondent(s) : 1,
MR KT DAVE ADDL.PUBLIC PROSECUTOR for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 28/09/2007

ORAL JUDGMENT

1. By way of this petition under Article 226 of the Constitution of India, read with sec.482 of the Code of Criminal Procedure, the petitioner – original complainant Narcotics Control Bureau through its authorised officer

has prayed for appropriate order to quash and set aside the order dtd.12/7/2007 passed by the learned Additional Sessions Judge and Second Fast Track Court, Nadiad below application Ex.159 in Special NDPS Case No.1 of 2004 and to declare that the provisions of sec.31-A of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter shall be referred to as “the Act” for short) would be applicable to the facts of the present case for the purpose of sentencing the accused, if convicted, in connection with the commission of the offences for which they are tried vide Special NDPS Case No.1 of 2004.

2. Criminal proceedings by way of Special NDPS Case No.1 of 2004 have been initiated against the respondent No.1 – original accused for the offences punishable under the provisions of the Act. In the said case, the allegations against the respondent accused is that 40.500 Kilogram Charas is recovered from the accused persons inclusive of respondent and all the accused including the respondent No.1 herein came to be chargesheeted and charge was framed at Ex.4 by the learned Special Judge, Fast Track Court, Anand on 9/4/2004. Since the accused pleaded not guilty, the accused persons were put to trial

and the prosecution examined witnesses and produced / exhibited certain documents in support of the case against the accused persons. After conclusion of the arguments of the prosecution as well as defence and before judgment could be pronounced, an application under sec.216 of the Code of Criminal Procedure came to be preferred by the prosecution on 9/5/2007 for addition of Charge under sec.31-A of the Act contending inter-alia that earlier the respondent accused was tried and convicted for the offences punishable under sec.8(c) read with secs.20(B) and 29 of the Act by the learned Additional Sessions Judge, Court No.13, Ahmedabad vide judgement and order dtd.20/10/2000 passed in Sessions Case Nos.60 and 271 of 2000 and the said conviction judgement and order came to be confirmed by the Division Bench of this Court by judgment and order dtd.16/11/2006 passed in Criminal Appeal Nos.1063 and 1073 of 2000. Over and above, in Special NDPS Case No.1 of 2004, 40.500 Kilograms of Hshish / Charas has been recovered from the accused persons inclusive of the respondent accused and as per table published in exercise of powers conferred under Clauses VII (a) and XXiii(a) of sec.2 of the Act, the item / Narcotic

drugs/psychotropic substance/cannabis and cannabis hashish is in common parlance known as charas / hashish as can be found at entry No.23 and the small quantity in column No.5 for the said substance is 100 gram and commercial quantity of the said substance in the table is 1 Kg. Therefore, it was prayed in the said application to add charge under sec.31-A of the Act.

3. The learned Additional Sessions Judge and 2nd Fast Track Court, Nadiad by his impugned order dtd.12/7/2007 dismissed the application Ex.159 preferred by the petitioner by observing that in the present case unless at the time of conclusion of the trial, it is proved that only the respondent accused was in possession of commercial quantity of Charas, sec.31-A cannot be added, more particularly in the present case, there are more than one accused persons. Being aggrieved by and dissatisfied with the order passed by the learned Additional Sessions Judge and 2nd Fast Track Court, Nadiad dtd.12/7/2007 below application Ex.159 in Special NDPS Case No.1 of 2004, the petitioner – original complainant has preferred the present petition under Articles 226 and 227 of the Constitution of India read with sec.482 of the Code of Criminal Procedure.

4. Mr.P.R. Abichandani, learned advocate appearing on behalf of the petitioner – Narcotic Control Bureau has submitted that the impugned order passed by the trial court is absolutely illegal and contrary to the provisions of sec.31-A of the Act. It is submitted that when the respondent accused has been tried and convicted earlier for the offences punishable under sec.8-c read with sections 20(B) and 29 of the Act and the said conviction came to be confirmed by the Division Bench of this Court, sec.31-A of the Act would be attracted. It is submitted by him that as per Sec.31-A of the Act, if any person who has been convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, any of the offences punishable under sections 19, 24, 27A and for offences involving commercial quantity of any narcotic drug or psychotropic substance, is subsequently convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit an offence shall be punishable with death. Therefore, it is submitted that the learned trial court has materially erred in rejecting the application of the petitioner for addition of sec.31-A of the Act on the ground that there are more than one accused and that it

is yet not proved that the respondent accused was in exclusive possession of the commercial quantity. It is submitted that all the aforesaid aspects are to be considered at the time of final judgment and at present the question was with regard to addition of sec.31-A of the Act only and considering the provisions of sec.31-A even if the accused may not be found in possession of commercial quantity, but if ultimately it is found that the accused has abeted or attempted to commit or even he has been convicted for the commission of criminal conspiracy to commit, any of the offences punishable under the Act, sec.31-A of the Act would be attracted. Submitting accordingly it is requested to allow the present petition.

5. This Court admitted the petition vide order dtd.29/8/2007, making the rule returnable on 11/9/2007. As the respondent was in judicial custody in Sabarmati Central Jail, notice of this petition was to be served through jail. The Judicial Jailer, Sabarmati Central Jail, Ahmedabad has submitted his report dtd.1/9/2007 stating that he has tried to serve the notice of this petition upon the respondent accused in the jail and he was also explained with regard to the same, but he has refused to accept the

notice of the present petition. Considering the refusal by the respondent No.1 and the report of the Judicial Jailer, Central Jail, Ahmedabad dtd.1/9/2007, notice upon the respondent No.1 is to be treated to have been served upon the respondent No.1 and therefore, the present petition is proceeded further ex-parte against the respondent No.1 – original accused.

6. Mr.K.T. Dave, learned Additional Public Prosecutor has supported the petitioner and submitted that the impugned order passed by the learned Additional Sessions Judge rejecting the application of the petitioner for addition sec.31-A of the Act is illegal and contrary to the provisions of sec.31-A of the Act, which requires to be quashed and set aside.

7. At the outset, it is required to be noted that earlier the respondent No.1 – original accused is convicted by the learned Additional Sessions Judge, Court No.13, Ahmedabad by judgment and order dtd.20/10/2000 in Sessions Case Nos.60 and 271 of 2000 for the offences punishable under sec.8(c) read with sec.20(B) and 29 of the Act and the said judgment and order of conviction has been confirmed by the Division Bench of this Court by judgment and order dtd.16/11/2006 passed in Criminal

Appeal Nos.1063 and 1073 of 2000. That while the respondent accused was on parole, he committed another offence on 15/7/2003 and 40.500 kgs. Hashish /charas was found from the accused persons inclusive of the respondent accused, for which he is tried by Special NDPS Case No.1 of 2004. Considering the above facts and when earlier the respondent accused was convicted for the offences under section sec.8(c) read with sections 20(B) and 29 of the Act, the petitioner submitted an application for addition of sec.31-A of the Act. Section 31-A of the Act reads as under:-

> 31-A. Death penalty for certain offences after previous conviction.-
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> (1) Notwithstanding anything contained in section 31, if any person who has been convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, any of the offences punishable under [section 19, section 24, section 27A and for offences involving commercial quantity of any narcotic drug or psychotropic substance] is subsequently convicted of the

commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, an offence relating to-

(a) engaging in the production, manufacture, possession, transportation, import into India, export from India or transshipment, of the narcotic drugs or psychotropic substances specified udder column (1) of the Table below and involving the quantity which is equal to or more than the quantity indicated against each of such drugs or substances as specified in column (2) of the said Table.

(b) financing, directly or indirectly, any of the activities specified in clause (a), shall be punishable with death.

(2) where any person is convicted by a competent court of criminal jurisdiction outside India under any law corresponding to the provisions of [section 19, section 24 or section 27A and for offences involving commercial quantity of any narcotic drugs or psychotropic substance], such person, in respect of

such conviction, shall be dealt with for the purposes of sub-section (1) as if he had been convicted by a court in India.]

8. Now considering sec.31-A of the Act, Notwithstanding anything contained in section 31, if any person who has been convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, any of the offences punishable under section 19, section 24, section 27A and for offences involving commercial quantity of any narcotic drug or psychotropic substance is subsequently convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, an offence relating to engaging in the production, manufacture, possession, transportation, import into India, export from India or transshipment, of the narcotic drugs or psychotropic substances specified udder column (1) of the Table and involving the quantity which is equal to or more than the quantity indicated against each such drugs or substances as specified in column (2) of the said Table, financing, directly or indirectly, any of the activities specified in clause (a), shall be punishable with death. Now, so far as Hashish /

Charas which is found from the respondent No.1 – accused is concerned,the same would be found at entry N.23 and small quantity in column No.5 for the said substance is 100 grams and commercial quantity of the said substance in the table is 1 Kg. In the present case 40.500 Kgs. Of Hashish / Charas has been recovered from the accused and therefore, Sec.31-A of the Act would be attracted, as the respondent accused is already convicted earlier for the offences involved in the commercial quantity of Charas i.e. 8.026 kgs. Now considering the order passed by the learned Additional Sessions Judge below application Ex.159, it appears that the said application has been rejected by the learned trial court on the ground that in the present case there are more than one accused and it cannot be decided at this stage that the respondent No.1 – accused was in exclusive possession of commercial quantity of Charas / Hashish i.e. more than 1 kg. The learned Additional Sessions Judge has committed an error in holding so. Considering sec.31-A of the Act, even any person who has been convicted of the commission or attempt to commit or abetment, or criminal conspiracy to commit, any of the offences punishable under sections 19, 24 and 27A and for the

offences involving commercial quantity of any narcotic drug or psychotropic substance is subsequently convicted of the commission of, or attempt to commit, or abetment of, or commercial conspiracy to commit,an offence relating to engaging in the production, manufacture, possession, transportation, import into India, and as mentioned in sub-section (a) of section 31-A shall be punishable with death and therefore, ultimately even if the respondent accused may not be found in possession of more than commercial quantity, but if it is found that he has committed the offence of abetment or criminal conspiracy, sec.31-A should be attracted. It is also required to be noted that at this stage, what was required to be considered was to add sec.31-A of the Act and whether death sentence would be awarded considering sec.31-A of the Act is required to be considered at the time of passing of the final order of conviction and therefore, the learned Additional Sessions Judge and Fast Track Court, Nadiad has committed an error in rejecting the application Ex.159 for addition of sec.31-A of the Act. In the facts and circumstances of the case and considering the fact that earlier the respondent No.1 accused has been convicted for the offences punishable

under the Act and again while on parole, he has been involved in the offence punishable under the Act and 40.500 kgs. Charas has been recovered from the accused persons inclusive of the respondent accused, sec.31-A would be attracted and sec.31-A is to be added and under the circumstances, the impugned order passed by the learned Additional Sessions Judge rejecting application Ex.159 is required to be quashed and set aside and the application Ex.159 is required to be allowed.

9. For the reasons stated above, the petition succeeds. The impugned order passed by the learned Additional Sessions Judge and Fast Track Court, Nadiad below application Ex.159 in Special NDPS Case No.1 of 2004 dtd.12/7/2007 is hereby quashed and set aside and the application Ex.159 in Special NDPS Case No.1 of 2004 is allowed and sec.31-A of the Act is ordered to be added. Rule is made absolute. D.S. Permitted.

[M.R. SHAH,J.]

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